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No. 98-821

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

BOARD OF REGENTS OF THE STATE OF TENNESSEE, ET AL.
Petitioners,

v.

DALVAN M. COGER, ET AL.,
Respondents.

and

UNITED STATES OF AMERICA,
Intervenor Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

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BRIEF FOR *AMICI* STATES OF OHIO, ALABAMA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, INDIANA, IOWA, LOUISIANA, MISSISSIPPI, MINNESOTA, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, SOUTH CAROLINA, TEXAS, UTAH, WYOMING AND THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI* INTEREST

Amicus State of Ohio and 23 other *amici* States join in supporting the petition for certiorari filed by the Board of Regents of the State of Tennessee. The questions in this case are whether Congress, in enacting the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, intended to abrogate the States' Eleventh Amendment immunity from money-damages actions and, if so, whether it had the power to do so under section five of the Fourteenth Amendment.

The recent decision to grant certiorari in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, No. 98-531, *petition granted* January 8, 1999 (applicability of Patent Act claims against the States in federal court) and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, No. 98-149, *petition granted* January 8, 1999 (applicability of unfair competition and false advertising claims under the Lanham Act against the States in federal court), demonstrates that the Court is aware of the importance of questions addressing the scope of Congress' authority to abrogate the States' Eleventh Amendment immunity. Furthermore, as confirmed by the recent filing of *amici* briefs on related subjects, the States have an immediate and vital interest in these issues. *See, e.g., State Bd. of Equalization of the State of California v. Southern Pacific Transportation Co.*, No. 98-584, *petition pending* (applicability of 4-R Act to claims against the States in federal court). The federal government also has an interest in these issues. It recently filed a petition for certiorari in *United States v. Florida Bd. of Regents*, No. 98-796, *petition pending*, a case concerning the applicability of claims filed against the States in federal court under the ADEA and the Americans with Disabilities Act.

Each of these types of claims generally, and each of the ADEA claims specifically, concerns the States for a number of reasons. The States face considerable costs in defending these cases, to say nothing of the potential damages and attorney fees in losing them. However, more than the potential expense explains the States' opposition to the Sixth Circuit's decision in this case and similar decisions by other courts of appeals. In holding that Congress may enact the ADEA under section five of the Fourteenth Amendment, the Sixth Circuit neglected the recent teachings of *City of Boerne v. Flores*, 521 U.S. 507 (1997), and sidestepped the requirements of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The first principles of a limited national government embodied in these decisions do far more than just protect the coffers of State governments. They ultimately further the transcendent goal of federalism – that individual liberty is most effectively secured by dividing the country into national and State governments, each with well-preserved and separate sovereign powers. In the interest of preventing the dilution of these critical principles, the *amici* States submit this brief for the Court's consideration.

REASONS FOR GRANTING THE WRIT

A. CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUE IS RECURRING AND THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH OTHER COURTS OF APPEALS.

As the petition asserts, there is a significant conflict of authority on both issues relevant to this case: (1) whether Congress has clearly expressed its intent to abrogate the States' immunity; and (2) whether Congress has the power to abrogate the States' immunity.

On the question of intent, the Eighth Circuit has held that the ADEA "does not reflect an unmistakably clear intent to abrogate Eleventh Amendment immunity." *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 825 (1998). Judge Edmondson of the Eleventh Circuit reached the same conclusion in *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1430 (11th Cir. 1998) (op. by Edmondson, J.) *petition pending*, No. 98-791. In contrast, several other courts of appeals, including the Sixth Circuit in this case, found that Congress clearly expressed its intent to abrogate in the text of the statute. *See Cooper v. New York State Office of Mental Health*, Nos. 97-9367, 97-9433, 97-9543, 1998 WL 898290, at *4 (2d Cir. Dec. 23, 1998); *Migneault v. Peck*, No. 97-2099, 1998 WL 74154, at *3 (10th Cir. Oct. 23, 1998); *Keeton v. University of Nev. Sys.*, 150 F.3d 1055, 1057 (9th Cir. 1998); *Scott v. University of Miss.*, 148 F.3d 493, 500 (5th Cir. 1998); *Goshtasby v. Board of Trustees*, 141 F.3d 761, 765-66 (7th Cir. 1998).

A similar division of authority exists regarding Congress' power to abrogate State sovereign immunity under section five of the Fourteenth Amendment. The Eighth Circuit held that no such power exists, as the ADEA is not a valid exercise of Congress' section five authority. *Humenansky*, 152 F.3d at 826-28. And Judge Cox of the Eleventh Circuit agreed. *See Kimel*, 139 F.3d 1426, 1444 (Cox, J., concurring in part, dissenting in part). In contrast, the Second, Fifth, Seventh, Ninth and Tenth Circuits have all followed the Sixth Circuit's analysis in this case, holding that Congress possesses the requisite authority to make the ADEA applicable to the States in money-damages actions brought in federal court.

There plainly is a conflict of lower-court authority of sizable proportions on both issues, one that illustrates abundant consideration of the competing positions. Further

delaying review will not meaningfully improve the Court's consideration of the issue. Nor is there any way in which this conflict can be resolved save by a decision from this Court.

B. THE WRIT SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT'S ANALYSIS DISREGARDS THIS COURT'S PRECEDENTS REGARDING THE CLEAR STATEMENT DOCTRINE AND CONGRESSIONAL POWER.

The ADEA does not contain a clear showing of congressional intent to abrogate the States' immunity, nor are the provisions of the ADEA a valid exercise of congressional power authorized by section five of the Fourteenth Amendment. The Sixth Circuit erred in its holdings on both issues.

The Sixth Circuit's analysis is incorrect as it fails to respect the teachings of either *Seminole Tribe* or *City of Boerne*. In *Seminole Tribe*, this Court ruled that Congress must clearly state its intention to abrogate the States' immunity. *Seminole Tribe*, 517 U.S. at 54. In *City of Boerne*, this Court stated that Congress' power to legislate under section five of the Fourteenth Amendment was limited to remedying violations of the Fourteenth Amendment. *City of Boerne*, 117 S.Ct. at 2163-64. In holding that the States' immunity had been abrogated by the ADEA, the Sixth Circuit failed to correctly apply the holdings of this Court.

1. The ADEA Does Not Contain Language Clearly Expressing Congress' Intent To Abrogate State Immunity.

State immunity may be abrogated only when Congress "mak[es] its intent[] unmistakably clear in the language of the

statue." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (Education for the Handicapped Act did not abrogate States' Eleventh Amendment immunity, because the intention of Congress to abrogate was not "unmistakably clear in the language" of the statute). The Sixth Circuit found that the 1974 amendments to the ADEA which expanded the definitions of "employer" and "employee" to include States and state employees demonstrated Congress' unmistakably clear intent. *Coger v. Board of Regents of the State of Tennessee*, 154 F.3d 296, 301 (6th Cir. 1998).

The expansion of the ADEA to include claims against the States creates an inference that Congress intended the ADEA to be enforceable against the States in federal court. Contrary to the reasoning of the Sixth Circuit, however, language sufficient to create an inference is insufficient to abrogate State sovereign immunity under the Eleventh Amendment. *Dellmuth*, 491 U.S. at 232. The Court has previously rejected the lower court's reasoning, and held that amendment of the definitions of "employee" and "employer" to include the state workers and States is insufficient to abrogate the States' sovereign immunity. In *Employees of the Dep't of Public Health and Welfare v. Missouri*, 411 U.S. 279 (1973), the Court ruled that the amendment of the Fair Labor Standards Act, 29 U.S.C § 201 *et. seq.*, to include state workers without changing the enforcement provisions of the statute to extend liability to the States, was insufficient to abrogate the States' immunity. *Id.* at 285.

Although the ADEA's definitions of "employee" and "employer" were expanded by the 1974 amendments, Congress failed to amend the enforcement provision of the ADEA to extend liability to the States. Therefore, under this Court's holdings in *Employees of the Dep't. of Public Health*, *Dellmuth*, and *Seminole Tribe*, the ADEA does not contain a

sufficiently clear statement of congressional intent to abrogate the States' Eleventh Amendment immunity.

2. The Sixth Circuit's Decision Disregards the Court's Holding In *City of Boerne*.

In construing section five of the Fourteenth Amendment, the Supreme Court has *never* held that the provision authorizes Congress to establish new rights not otherwise created by the Fourteenth Amendment. Indeed, since the days of Reconstruction, Congress' section five authority has been limited to outlawing state laws or practices that violate Fourteenth Amendment rights – as that Amendment has been construed by the federal courts. As the Court held in the *Civil Rights Cases,* 109 U.S. 3 (1883):

> [T]he last section of the Amendment invests Congress with power to enforce it by appropriate legislation. *To enforce what? To enforce the prohibition.* To adopt appropriate legislation for correcting the effects of prohibited State laws and State acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation or State action, of the kind referred to.

Id. at 11 (emphasis added).

Section five legislation thus has to "be adapted to the mischief and wrong which the Amendment was intended to provide against." *Id.*, at 13. It "cannot properly cover the

whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be ... to make Congress take the place of the State Legislatures and to supersede them." *Id. See also, Ex parte Virginia,* 100 U.S. 339, 348 (1880) (while section five "gives authority for congressional interference and compulsion in the cases embraced with the Fourteenth Amendment," it "is but a limited authority" that "extend[s] only to a single class of cases"); *Strauder v. West Virginia,* 100 U.S. 303, 309 (1880) (the point of section five was not to authorize Congress to place its own gloss on the amendment but to address the problem that "prejudice" in the States could make the guarantees a dead letter).

Nor do the voting rights cases depart from this view. In *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), and *Katzenbach v. Morgan,* 384 U.S. 641 (1966), the Court upheld Congress' suspension of literacy tests under section five because such tests historically had been used to disenfranchise blacks. *See also, City of Rome United States,* 446 U.S. 156 (1980) (refusing "to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from [undoing] or [defeating] the rights recently won by Negroes").

Most recently, in *City of Boerne v. Flores,* 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997), the Court reaffirmed the proper scope of section five legislation by holding that the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.*, was not a valid exercise of Congress' "remedial" power. RFRA's proponents claimed that section five authorized Congress "to provide statutory protection for a constitutional *value* when the Supreme Court had been unwilling to assert its authority." H.R. Rep. No. 88, 103rd Cong., 1st Sess., at 9 (1993) (emphasis added). In

rejecting that view, the Court held that section five authorizes Congress only to "enforce" the Fourteenth Amendment, *i.e.*, to "remedy" *actual violations* of the Fourteenth Amendment – not to decree or redefine the substance of the Fourteenth Amendment's restrictions on the states.

Old and new dictionaries confirm that the verb "enforce" in section 5 is a confining one. It merely empowers Congress to compel "obedience" to something – here, to require the States to adhere to the prohibitions contained in the equal protection and due process clauses. *See,* Webster, *An American Dictionary of the English Language* (1869) ("1. To put force upon; to force; to constrain; to compel; as to *enforce* obedience to commands."); *A Dictionary of Law* (1893) 466 ("To constrain, or compel; to give effect to: as, to enforce an order of court."); *Dictionary of Words and Phrases* (1899) 322 ("To cause to have force and effect. To compel obedience to."); *The Oxford English Dictionary* (1933) Vol. III, 171 ("To compel the observance of (a law); to support by force (a claim, demand, obligation)."); *Webster's New International Dictionary* (1939) 847 ("To force; constrain; compel; as, to *enforce* obedience.").

As the Court stated in *City of Boerne*:

> Congress' power under § 5, however, extends only to "enforcing" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," *South Carolina v. Katzenbach, supra*, at 326. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause

> cannot be said to be enforcing the Clause. *Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.* Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

City of Boerne, 117 S. Ct. at 2163-64 (emphasis added). Moreover, the Court observed that when Congress exercises its section five powers "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id.*, 117 S. Ct. at 2164.

Finally, the Court compared RFRA to other proper exercises of Congress' section five enforcement authority:

> Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.

Id., 117 S. Ct. at 2169-70.

Measured against these standards, Congress did not have authority to create private money damages actions under

ADEA that are enforceable against States in federal court. As an initial matter, no tenable claim exists that the ADEA *enforces* existing constitutional protections. Legislative classification based on age is neither suspect nor quasi-suspect and therefore is subject only to "rational basis" scrutiny under the Equal Protection Clause. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976); *Vance v. Bradley,* 440 U.S. 93 (1979). The ADEA, similar to RFRA, simply holds employment decisions in which age is a factor to a higher standard than provided for under equal protection jurisprudence – one essentially indistinguishable from the scrutiny applicable to decisions based on ethnicity or gender. By subjecting age-based classifications to a strict scrutiny standard, the ADEA attempts to make a substantive change in the constitutional rights of those individuals protected by the ADEA by creating a new "suspect classification." That this sort of restructuring of constitutional rights is beyond Congress' power has been recognized by the Court since *Marbury v. Madison*, 5 U.S. 137 (1803).

As the Court stated in *City of Boerne*:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and like other acts . . . alterable when the legislature shall please to alter it." Under this approach it is difficult to conceive of a principle that would limit congressional power.

City of Boerne, 117 S.Ct. at 2168, quoting *Marbury v. Madison*, 5 U.S. 137, 177 (internal citations omitted).

The ADEA, like RFRA, does not remedy prior discrimination by state government. Congress articulated the following reason for extending the ADEA to the States:

> As the President said in his message of March 23, 1972, supporting such an extension of coverage under the ADEA, "Discrimination based on age – what some people call 'age-ism' – can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the National [*sic*] the contribution they could make if they were working."

H.R. Rept. No. 93-913, 93rd Cong., 2d Sess., *reprinted at U.S. Code Cong. & Admin. News* (1974), 2811, 2849. This statement explains why Congress found the ADEA's extension to the States to be desirable as a matter of social policy, but hardly constitutes evidence that prior state-sponsored discrimination towards older employees had violated the Equal Protection Clause.

Indeed, the legislative history fails to indicate any consideration by Congress of whether *States* had a history of violating the Equal Protection Clause in their treatment of older employees. In introducing the unsuccessful effort to extend the ADEA to the States in 1972, for example, Senator Bensten remarked only that "there is very disturbing evidence to suggest that the *Federal Government* . . . may be a leading

offender in applying pressure tactics to coerce older workers to retire at an early age." 118 Cong. Rec. 7745 (1972) (emphasis added). *See also*, Sen. Rept. No. 93-846, 93rd Cong., 2d Sess., at 112 (finding that in *federal* government employment, "older employee[s] had been singled out for reduction-in-force action; that the emphasis on early retirement placed an unequal burden on middle-aged workers; and in certain training programs youth is emphasized in determining eligibility").

Even if there were support in the legislative history for the argument that the ADEA's extension to the States was a response to discriminatory age limits set in the past, it was precisely such age limits which were held *not* to violate the Equal Protection Clause in *Murgia* and *Vance v. Bradley*. Thus, the ADEA cannot be regarded as an effort to "remedy" prior state violations of the Equal Protection Clause's rational basis test. Rather, it is merely an effort to afford state and local government employees rights *not* enjoyed under the rational basis test. Therefore, the ADEA is not valid section five legislation and may not abrogate the States' Eleventh Amendment Immunity.

Because the ADEA was not also validly enacted pursuant to section five of the Fourteenth Amendment, the Eleventh Amendment as interpreted in *Seminole Tribe* prevents its private enforcement against the State in damage actions brought in federal courts. It needs to be explained, however, that the ADEA still protects state and local government employees. This Court has already held that the ADEA is a valid enactment as applied to the States pursuant to the Commerce Clause. *EEOC v. Wyoming*, 460 U.S. 226 (1983). The Eleventh Amendment does not protect the States from suit by the federal government, *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965), nor does it prevent private suits for injunctive relief, *Ex Parte Young*, 209 U.S.

123 (1908). Thus, although *City of Boerne* requires dismissal of the instant claim, it does not excuse public officials from compliance with the ADEA.

Finally, it must be remembered that the vision of federalism articulated here serves, not hinders, democracy. State sovereign immunity in federal courts, except in those cases necessary to enforce the overriding national commitments of the Civil War Amendments, protects democracy for the citizenry of each State. And the key point in this case is that public policy regarding employment of older Americans is not one of those fundamental national commitments contemplated after the Civil War, which necessarily overrides State sovereign immunity. For these reasons, the States should be immune from liability in federal court when the issue is whether or not a State, as employer, has improperly discriminated on the basis of age.

CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

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